

Exhibit D

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13 NORTHERN DISTRICT OF CALIFORNIA

14
15 In re ORACLE CORPORATION)
SECURITIES LITIGATION)

Master File No. C-01-0988-MJJ

16)

CLASS ACTION

17 This Document Relates To:)

PLAINTIFFS' REPLY IN FURTHER
SUPPORT OF THEIR MOTION FOR
CLASS CERTIFICATION

18 ALL ACTIONS.)

19 DATE: November 1, 2005
20 TIME: 9:30 a.m.
COURTROOM: The Honorable
Martin J. Jenkins

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1 **I. Oracle Corporation Cannot Credibly Contest that Common Questions of**
2 **Law and Fact Predominate Over Individual Questions**

3 A class action is proper under Fed. R. Civ. P. 23(b)(3) if questions of law and fact common
4 to the members of the class predominate over questions only affecting individual members, and the
5 class action mechanism is superior to the other available methods for the fair and efficient
6 adjudication of the controversy. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). The
7 predominance test is readily met in cases alleging securities fraud. *Id.* at 625.

8 Defendants mischaracterize the Supreme Court's ruling in *Dura Pharms., Inc. v. Broudo*, 544
9 U.S. ___, 125 S. Ct. 1627 (2005), and challenge the clear predominance of common questions in this
10 action. They contend that *Dura* requires plaintiffs to plead and prove a "'corrective disclosure' . . .
11 readily traced to the fraud"¹ to establish loss causation. Defs' Opp. at 9.² Bootstrapped to that
12 argument, defendants contend that absent a "corrective disclosure," plaintiffs' class certification
13 motion must provide a detailed methodology for proving loss causation and damages in order to
14 have a §10(b) class certified. *See* Defs' Opp. at 7 ("[p]laintiffs proffer no alternative methodology
15 by which injury could be traced class-wide"). *Dura*, however, does not mention, let alone require, a
16 "corrective disclosure" and does not address class certification. In fact, the Solicitor General in its
17 amicus brief supporting the *Dura* defendants, parted company on this issue, explicitly urging that
18 "the fraud can be revealed by means other than a corrective disclosure." Declaration of Shawn A.
19 Williams in Support of Plaintiffs' Reply in Further Support of Their Motion for Class Certification
20 ("Williams Decl."), Ex. A at 19-20.

21 *Dura* does not require a "corrective disclosure" to be proven or pled. That term is not even
22 mentioned. *Dura* simply requires that the revelation of the true financial condition of the company
23 cause a loss in value of the shares. *Dura*, 125 S. Ct. at 1634. But the court acknowledged that loss
24 causation can be pled with a "short and plain statement" in compliance with Fed. R. Civ. P. 8(a)(2)

25
26 ¹ Here, as elsewhere, citations and footnotes have been omitted and any emphasis added,
unless otherwise indicated.

27 ² "Defs' Opp." refers to Defendants' Opposition to Plaintiffs' Motion for Class Certification.
28

1 providing defendants with fair notice of what the relevant economic loss might be and “some
2 indication” of the causal connection with the fraud. *Id.*; accord *In re Daou Systems*, No. 02-56989,
3 2005 U.S. App. LEXIS 14945, at *47 (9th Cir. Feb. 2, 2005). Thus, under *Dura*, Fed. R. Civ. P. 9(b)
4 specificity linking a corrective disclosure to each false statement is not required. The Supreme Court
5 also specifically declined to address the form, content or quantum of proof at trial. *Daou*, 2005 U.S.
6 App. LEXIS 14945, at *47 (“We need not, and do not, consider other proximate cause or loss-related
7 questions.”).

8 Both defendants and their purported expert inexplicably ignore revelations alleged in
9 Plaintiffs’ Revised Second Amended Complaint for Violations of Federal Securities Laws
10 (“Complaint”) that alerted the market to Oracle Corporation’s (“Oracle” or the “Company”) true
11 financial condition that had been concealed or misrepresented by the fraud. These revelations of
12 fraud caused a 20% drop in Oracle’s stock price, sufficiently and plainly establishing the causal
13 connection between plaintiffs’ economic loss and the fraud alleged. Defendants seek to have a trial
14 of “the probable outcome of the merits” by injecting expert testimony at this class certification stage.
15 But, under the Notes of the Advisory Committee on 2003 Amendments of Fed. R. Civ. P. 23(c)(1),
16 an evaluation of the probable outcome “is not properly part of the certification decision.” *See Eisen*
17 *v. Carlisle*, 417 U.S. 156, 177 (1974) (“We find nothing in either the language or history of Rule 23
18 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to
19 determine whether it may be maintained as a class action.”).

20 The 2003 Advisory Note limits the inquiry to identifying the “issues that actually will be
21 presented at trial” and “determin[ing] how the case will be tried” to assess whether the issues are
22 “susceptible of class-wide proof.” Advisory Note, Fed. R. Civ. P. 23(c)(1). Challenges based on
23 causation do “not bar predominance satisfaction” because causation relates to the “right of a class
24 member to recover,” rather than “underlying common issues of the defendant’s liability.”
25 2 A. Conte & H. Newberg, *Newberg on Class Actions*, §4:26, at 241 (4th ed. 2002); *see, e.g.,*
26 *Cameron v. E.M. Adams & Co.*, 547 F.2d 473, 477 (9th Cir. 1976) (transaction causation established
27 class-wide if misrepresentations are shown to be material, “individual issues of reliance do not
28 hinder the predominance of the common question”). Common issues “predominate when liability

1 can be determined on a class-wide basis, even when there are some individualized damages issues.”
2 *In re VISA Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir. 2001), *cert. denied*, 125
3 S. Ct. 2277 (2005). As discussed below, each of Oracle’s contentions lacks legal or factual support
4 and must be rejected.

5 **A. Contrary to Defendants’ Assertion, *Dura* Nowhere Requires a**
6 **“Corrective Disclosure”**

7 Defendants’ opposition to plaintiffs’ motion for class certification rests entirely on the faulty
8 premise that *Dura* requires plaintiffs’ complaint to allege a so-called “corrective disclosure” that is
9 “directly attributable” to each alleged false statement in order to demonstrate that class action
10 treatment is proper under Fed. R. Civ. P. 23(b)(3). *See* Defs’ Opp. at 7, 11. Defendants concede, as
11 they must, that the predominance of class-wide issues is readily apparent in securities class actions.
12 Defendants assert that this case is unique. They say “[w]hat distinguishes this case from Section
13 10(b) suits in which loss causation may be addressed on a class-wide basis is that Plaintiffs allege no
14 ‘corrective disclosure.’” Defs’ Opp. at 7.

15 Nowhere in *Dura* does the court require a corrective disclosure attributable to a specific
16 misrepresentation. The Court instead speaks in terms of the relevant truth, *i.e.*, the true state of the
17 company’s financial condition making its way to the market, removing inflation in the stock price.
18 125 S. Ct. at 1631-32. The *Dura* defendants and their industry *amici* urged the Supreme Court to
19 require proof and Rule 9(b) pleading of an *explicit* corrective disclosure linking any subsequent
20 stock decline to a previous misrepresentation. But the Supreme Court applied Fed. R. Civ. P. 8, not
21 9(b), and expressly declined to go that far: “We need not, and do not, consider other proximate cause
22 or loss-related questions.” *Dura*, 125 S. Ct. at 1633-34. The Supreme Court never adopted a
23 specific corrective disclosure requirement, in part because one of *Dura*’s own *amici*, the Solicitor
24 General, agreed that a corrective disclosure test was “mistaken.” As the Solicitor General explained,
25 inflation in the price attributable to fraud might be reduced by “events rather than words.” *See*
26 Williams Decl., Ex. A at 20. The government also provided an example that fits the Oracle fraud
27 exactly:

28 If, for example, the misrepresentation is that the financial condition of the company
is such that it would be immune from a particular downturn in the economy, and if

1 there is such a downturn and the company is affected, *those events* will reveal *to the*
2 *public that the representation is untrue.*

3 *Id.* at 20. Moreover, requiring a corrective disclosure would allow wrongdoers to “immunize
4 themselves” from fraud liability by “refusing to admit” falsity or by delaying or misdirecting the
5 public from fraud with partial disclosures and half truths. *See In re Worlds of Wonder Sec. Litig.*, 35
6 F.3d 1407, 1422 (9th Cir. 1994).

7 Defendants’ interpretation of *Dura* has also been flatly rejected by the Ninth Circuit in *Daou*,
8 2005 U.S. App. LEXIS 14945. In *Daou*, defendants contended and the district court ruled that
9 because there was no specific announcement or negative public statement concerning *Daou’s*
10 improper accounting at the time of the decline in *Daou’s* stock price, plaintiffs’ allegation that the
11 false financials caused their loss was not sufficiently linked to their damages to adequately plead loss
12 causation. *Daou*, 2005 U.S. App. LEXIS 14945, at **46-47. The Ninth Circuit reversed, holding
13 that plaintiffs’ allegations that *Daou’s* stock price fell “after defendants began to reveal figures
14 showing the company’s *true financial condition*,” *e.g.*, deteriorating margins and significant
15 earnings projections shortfall, was sufficient under *Dura* and Fed. R. Civ. P. 8 to provide defendants
16 “some indication” that the stock drop was causally related to concealed information. *Id.* at *45;
17 *accord Livid Holdings Ltd. v. Solomon Smith Barney, Inc.*, No. 03-35374, 2005 U.S. App. LEXIS
18 15815, at *16 (9th Cir. Aug. 2, 2005); *see also In re Parmalat Sec. Litig.*, No. 04 MD 1653 (LAK),
19 2005 U.S. Dist. LEXIS 12554 (S.D.N.Y. June 28, 2005) (“corrective disclosure” not necessary where
20 subject of the misrepresentation and omissions caused loss); *accord In re JDS Uniphase Corp. Sec.*
21 *Litig.*, 238 F. Supp. 2d 1127 (N.D. Cal. 2002); *In re Omnivision Techs., Inc.*, No. C-04-2297 SC,
22 2005 U.S. Dist. LEXIS 16009 (N.D. Cal. July 29, 2005); *In re Immune Response Sec. Litig.*, No.
23 01CV1237 J (WMc), 2005 U.S. Dist. LEXIS 12602, at **94, 96 (S.D. Cal. June 7, 2005). Oracle’s
24 “corrective disclosure” theory is wrong under *Dura*.

25 **B. Defendants’ Unsupported Expectation of Individual Damages Issues**
26 **Cannot Defeat Class Certification**

27 Defendants nevertheless contend that without “corrective disclosures,” specifically tied to the
28 misrepresentations, the calculation of damages will require individual analysis of the stock price
impact of each omission and misstatement and each investor’s purchases during the class period.

1 Defs' Opp. at 11-12. Apart from the fact that no corrective disclosure is required, liability here will
2 be determined by concededly class-wide issues of falsity, materiality, and scienter. Thus, even if
3 there are individual damages and causation issues, they do not defeat the predominance of common
4 issues or prevent class certification. *See Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (the
5 amount of damages is invariably an individual question but does not defeat class action treatment).
6 In addition to overlooking *Blackie*, defendants ignore cases throughout the country that have rejected
7 the notion that individualized issues of damages can defeat class certification. *See VISA*
8 *Check/Mastermoney*, 280 F.3d at 139 ("[c]ommon issues may predominate when liability can be
9 determined on a class-wide basis, even where there are some individualized damage issues");
10 *Allapattah Servs., Inc. v. EXXON Corp.*, 333 F.3d 1248 (11th Cir. 2003) (individualized issues of
11 damages do not prevent a finding that common issues in the case predominate); *In re Unioil Sec.*
12 *Litig.*, 107 F.R.D. 615, 622 (C.D. Cal. 1985) (common nucleus of misrepresentations predominate
13 over individual questions of damages). Moreover, here loss causation and damages would remain a
14 predominantly class-wide issue based on proof of: (a) defendants' misrepresentations; omissions, or
15 other fraudulent conduct; (b) a resulting inflation in stock price; (c) purchase by class members at the
16 inflated price; and (d) an event study establishing a causal connection between defendants'
17 misconduct and plaintiffs' economic loss. *See Declaration of Bjorn I. Steinholt in Support of*
18 *Plaintiffs' Reply in Further Support of Their Motion for Class Certification* ("Steinholt Decl.").

19 Oracle has not offered the Court any factual basis for the assertion that individual damages
20 issues will arise resulting in multiple mini-trials, nor has it offered any applicable authority for its
21 contention that this proposed class should not be certified. *Newton v. Merrill Lynch, Pierce, Fenner*
22 *& Smith, Inc.*, 259 F.3d 154, 187-88 (3d Cir. 2001), is wholly inapposite. In that case, plaintiffs
23 sought to certify a §10(b) class, with each class member alleging that Merrill Lynch failed to
24 disclose to its investors that it had not used "reasonable efforts to maximize the economic benefit to
25 the client[s] in each transaction." *Newton*, 295 F.3d at 173. Because *Newton* did not involve an
26 omission or misrepresentation that affected the value of a security in an efficient market, plaintiffs
27 were not entitled to the presumption of reliance. *Id.* at 175, 190. To show economic loss, each
28 member would have had to establish that a better price was obtainable for each trade executed on his

1 behalf. *Id.* at 178. In fact, the *Newton* court acknowledged that: “the facts of this case do not
2 resonate with those typical of securities violations under Rule 10b-5.” *Id.* at 173. The court
3 confirmed that in “class actions based on ‘fraud-on-the-market’ . . . the alleged conduct itself causes
4 economic injury.” *Newton*, 295 F.3d at 188.³

5 **C. Oracle and Its Expert Ignore Detailed Disclosures Revealing Oracle’s**
6 **True Financial Condition**

7 Defendants are also wrong in seeking to conduct a damages trial by improperly offering
8 expert testimony at the certification stage. Their expert, Mr. Stefan Boedeker (“Mr. Boedeker”),
9 asserts that without a corrective disclosure, plaintiffs will not be able to prove that Oracle’s stock
10 price movements are related to the alleged fraud. Defs’ Opp. at 8-9. This is a legal theory rejected
11 in *Dura* – not market expertise. Stock price can be affected by events, not just disclosures. Plaintiffs
12 are entitled to and will demonstrate through expert testimony of their own at trial that Oracle’s stock
13 price was artificially inflated by defendants’ fraudulent statements, omissions and conduct
14 throughout the Class Period (between December 14, 2000 and March 1, 2001). Plaintiffs will also
15 prove at trial that Oracle’s stock price dropped 20% on March 1, 2001, upon revelation of the true
16 financial health of Oracle that had been misrepresented and concealed by the fraud. *See* Steinholt
17 Decl., ¶¶5-9.

18 Although the Complaint does not currently allege any revelations of Oracle’s true financial
19 conditions prior to March 1, 2001, to account for the drop in Oracle’s stock price from the \$34 Class
20 Period high to \$21, the March 1, 2001, 20% price decline, upon partial revelation of the truth,
21 indicates that 20% of the stock price was attributable to the fraud. Contrary to defendants’ assertion,
22 plaintiffs are not required to offer damages experts at this stage. *See* Advisory Note, Fed. R. Civ. P.
23 23(c)(2). Rather, the parties agreed, and this Court’s Order set March 3, 2006 as the date for the
24 exchange of expert reports. *See* Williams Decl., Ex. B at 7.

25
26 ³ Defendants’ reliance on *West v. Prudential Sec., Inc.*, 282 F.3d 935 (7th Cir. 2002), is
27 similarly misplaced. There, too, plaintiffs were not entitled to the presumption of reliance because it
28 was never shown that the alleged false statements were ever made public. *Id.* at 93.

1 In any event, Mr. Boedeker fails to acknowledge the very disclosures he claims are lacking.
2 For example, Mr. Boedeker ignores the March 1, 2001 disclosures that caused Oracle's stock price
3 to drop 20% per share on a record 224 million shares traded. ¶75;⁴ Ex. 5. Mr. Boedeker says
4 **nothing** of Oracle's admission that in truth, the slowing economy was hurting Oracle's sales –
5 contrary to defendants' assurances otherwise only days earlier. ¶70 ("Oracle was not seeing an
6 impact on its results due to the slowing down in the United States economy."); see March 1, 2001
7 press release, "Oracle Announces Preliminary Third Quarter Earnings Results" ("A substantial
8 number of our customers decided to delay . . . based on the economic slowdown. . . . The problem is
9 the U.S. economy."); ¶¶74, 78; Ex. 4.

10 Mr. Boedeker says **nothing** of Oracle's disclosure that applications sales, *i.e.* 11i, which
11 plaintiffs allege had been hampered by the slowing economy and product defects, fell miserably
12 short of defendants' projections by 33%. Ex. 4. Even this disclosure itself was a half-truth. Only 14
13 days later, Oracle disclosed that 3Q01 applications sales actually missed by 66%. ¶77. Yet,
14 defendants had falsely assured investors earlier that 11i applications would grow 75% in the quarter.
15 ¶65(b).

16 And, Mr. Boedeker says **nothing** about the March 1, 2001 disclosure of the fact that the
17 Company would miss earnings projections by \$0.02 per share, the first Oracle earnings miss in
18 several years. ¶¶75, 76. All of these revelations were at the core of the Company's financial
19 condition and caused the Company's stock price to plummet. *Id.* Oracle has proffered no evidence
20 even suggesting that the March 1, 2001 loss was related to anything other than the fraud alleged.

21 At bottom, Mr. Boedeker's declaration not only improperly invites a battle of the experts, but
22 it lacks any analytical value as it inexplicably ignores the very revelations that plaintiffs allege to
23 indicate loss causation and economic loss. This Court has previously and specifically declined to
24 engage in a statistical duel of the merits defendants suggest here. See *Dukes v. Wal-Mart Stores,*
25 *Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). Indeed, plaintiffs need only show an inference that a

26
27 ⁴ All paragraph references ("¶") and exhibit references ("Ex."), refer to the Complaint, unless
28 otherwise indicated.

1 common question exists as to class-wide economic loss. *Id.* at 153 (no greater showing required on a
2 motion for class certification).

3 Oracle complains that because it did not specifically admit to the accounting fraud and 11i
4 defects, loss causation cannot be proved class-wide. Defs' Opp. at 9-10. As *Dura* author Justice
5 Breyer noted at the oral argument on January 12, 2005, the truth "might come out in many different
6 ways," not simply through an announcement by a corporate executive that "I'm a liar." Williams
7 Decl., Ex. C at 38-39.

8 Defendants seek to divide and isolate the fraud scheme alleged into separate components.
9 That rewrites the Complaint which alleges that there was a single scheme designed to conceal and
10 misrepresent Oracle's true financial conditions. ¶¶4-19. The scheme had several elements, but all
11 were aimed at this objective: conceal that the economy was hurting Oracle's results (¶¶7, 9-10),
12 conceal that product defects were hurting Oracle's results (¶¶6, 9-10, 15), conceal that Oracle's
13 financial results were not as represented or forecast. ¶8.

14 In March, however, Oracle was forced to admit missed earnings, revenue, and growth
15 forecasts, particularly in its applications and license business. Oracle also admitted that the economy
16 did impact sales. ¶¶72-82. Although product defects were not acknowledged, it is reasonable to
17 infer from other allegations of the Complaint that false statements about robust sales served to
18 conceal the Suite 11i defects that were in fact impacting sales. Numerous witnesses confirmed as
19 much and identified specific sales lost due to defects. And, defendant Larry Ellison later admitted,
20 "mea culpa," that there were defects. ¶15.

21 Equally important, the missed revenue-earnings-growth forecasts revealed that the true
22 overall financial condition of Oracle was not as represented. That overall financial health included
23 Oracle's historical financial performance, particularly in the quarter just preceding the failed
24 forecasts. ¶8. A company's historical financial results are a key piece of information considered by
25 investors in assessing the veracity of a company's forecasts of future performance. When the
26 forecasts fail, it is reasonable for investors to conclude that the historical results too are not as
27 represented.

1 Defendants cannot separate prior financial results simply because they never *confess* the
2 falsity of historical results. To do so would allow the wrongdoer to evade liability simply by
3 withholding, delaying, or misdirecting the cause of the failed forecast. The Ninth Circuit has
4 emphasized that wrongdoers cannot be allowed to “immunize” themselves by requiring explicit one-
5 to-one “corrective disclosure” that a price decline is linked to a specific falsehood. *In re Worlds of*
6 *Wonder*, 35 F.3d 1407, 1422 (9th Cir. 1994). Equally important, the “corrective disclosure” regime
7 defendants assert is nothing but Fed. R. Civ. P. 9(b) particularity in disguise, a regime that *Dura* was
8 asked to adopt – but did not. Under *Dura*, Fed. R. Civ. P. 8 controls and simply requires “some
9 indication” of the causal link between defendants’ fraud and plaintiffs’ loss. 125 S. Ct. at 1634. The
10 price decline on the missed forecasts and failed economy are explicit disclosures of *part* of the fraud
11 and meet Fed. R. Civ. P. 9(b), but these revelations also provide “some indication” – by plausible
12 and solid inferences – that Oracle’s overall finances and business, including its historical results,
13 application sales, and product defects, were concealed by the scheme. As such, the overall scheme is
14 linked to the price decline and loss suffered.

15 In short, the various misstatements on different subjects – economy, product integration,
16 forecasts, sales demand – were not discrete acts by random individuals – they were part of a single
17 centrally designed scheme by Oracle’s top leaders to conceal and delay revelation of Oracle’s true
18 financial health (enabling them to pocket \$900 million – while investors lost billions). It bears
19 remembering when Oracle fell 20% – there were 5.6 billion shares outstanding – causing a \$30
20 billion loss in one day. Many investors paid \$30 or more for their shares – reduced to \$16. But
21 defendants Ellison and Jeffrey Henley paid only \$0.23, or \$1 per share, respectively. ¶¶20-23.
22 Thus, while investors suffered real losses, defendants Ellison and Henley were still ahead \$15 or
23 more per share (hundreds of millions of dollars) – even at the \$16 stock price.

24 **II. The Proposed Class Representatives Are Adequate to Represent the Class**
25 **and Their Claims Are Typical**

26 As plaintiffs demonstrated in their motion, it is defendants’ burden to establish that the
27 proposed class representatives are inadequate to represent the class. *In re Epitope, Inc. Sec. Litig.*,
28 No. 92-759-RE, 1992 U.S. Dist. LEXIS 22705, at *10 (D. Or. Nov. 30, 1992). They must prove that

1 the proposed class representatives have either chosen incompetent counsel or that they have interests
2 that conflict with the class. *Id.* They have done neither. In fact, defendants say nothing about class
3 counsel and their challenges to the proposed class representatives appear to be more of an
4 afterthought rather than a serious challenge. Defendants offer no objection concerning 1199 SEIU
5 Greater New York Pension Fund ("SEIU 1199") or Ryan Kuehmichel's ("Mr. Kuehmichel")
6 adequacy, and assert in conclusory fashion that the others are inadequate, but with little (if any)
7 reference to hours and hours of deposition testimony. Defs' Opp. at 19-25. Contrary to defendants'
8 unsupported conclusions, the proposed class representatives are intimately familiar with this case
9 and are motivated to protect the interests of the class. They are adequate and should be certified.⁵

10 **A. SEIU 1199 Is an Adequate Class Representative**

11 Defendants have effectively conceded SEIU 1199's adequacy. Defs' Opp. at 20. Despite
12 nearly 16 hours of deposition testimony, defendants have not made a single credible argument about
13 why it should be denied class representative status. Defs' Opp. at 21-23. Nor could they: SEIU
14 1199's representative, John Chobor ("Mr. Chobor"), made it very clear that SEIU 1199 has a
15 thorough understanding of the case and is diligently prosecuting this action on behalf of the fund, its
16 beneficiaries, and the class, who "all stand in the same shoes." Chobor Depo. Tr. at 259:18-19.
17 Mr. Chobor knew all of the defendants by name, correctly described the Class Period, thoroughly
18 discussed the statements that are alleged to be false, and described why they were false. *Id.* at 7, 10,
19 188-94. There is no antagonism or disabling conflict between SEIU 1199 and the members of the

20
21 ⁵ Defendants malign plaintiffs' credibility for minor clerical errors in their lead plaintiff
22 certifications. Defs' Opp. at 20, 22. Defendants' attacks are frivolous. It is well-settled that such
23 minutia do not prohibit certification. See *In re CV Therapeutics, Inc. Sec. Litig.*, No. C 03-03709 SI,
24 2004 U.S. Dist. LEXIS 17419 (N.D. Cal. Aug. 5, 2004) (finding that omitting trading information
25 from a certification does not raise "serious questions about Crossen's credibility that would give rise
26 to a unique defense"); *In re Initial Public Offering Sec. Litig. ("IPO")*, 227 F.R.D. 65, 98-99
27 (S.D.N.Y. 2004) (same). Like *CV Therapeutics*, the errors here were simply inadvertent mistakes in
28 the loss schedules that were prepared based on the information that the lead plaintiffs had in their
possession at the time; and in the case of SEIU 1199, the unintended omission of a *single* case from
its submission that listed seven other cases. See Deposition Transcript of John Chobor ("Chobor
Depo. Tr.") at 63-67. (All deposition transcripts are identified by the deponents' last name followed
by "Depo. Tr.") The second case cited by defendants did not involve a lead plaintiff motion until
after SEIU 1199 filed its certification in this case. Williams Decl., Ex. D.

1 class that it seeks to represent. Defendants' silence about SEIU 1199's involvement in the case and
2 its understanding of the allegations speaks volumes about SEIU 1199's adequacy.

3 Defendants argue that SEIU 1199 should be disqualified as a "professional plaintiff[]" that is
4 somehow conspiring with lead counsel to serve its "own interests." Defs' Opp. at 21. Nonsense.
5 Courts have repeatedly rejected this kind of inflammatory argument for institutional investors that
6 are pursuing these actions on behalf of their beneficiaries. *See In re Critical Path, Inc. Sec. Litig.*,
7 156 F. Supp. 2d 1102, 1112 (N.D. Cal. 2001) ("institutional investors 'do not represent the type of
8 professional plaintiff [the PSLRA] seeks to restrict'"); *In re D.J. Orthopedics, Inc. Sec. Litig.*, No.
9 01-CV-2238-k (RBB), 2003 U.S. Dist. LEXIS 21534, at **19-20 (S.D. Cal. Nov. 16, 2003)
10 (rejecting "professional plaintiff" argument for institutional investor because "professional plaintiff"
11 prohibition "applies only to lead plaintiffs, not to class representatives"). While defendants have
12 chosen to ignore it, Mr. Chobor testified that SEIU 1199 is pursuing these actions *because the*
13 *Department of Labor mandates it*. Chobor Depo. Tr. at 55. In fact, Mr. Chobor explained at his
14 deposition that the Department of Labor considers it "best practice" for institutions to pursue
15 securities litigation and that Bart Lawson, who originated the action for SEIU 1199 (formerly Local
16 144 Nursing Home Pension Fund), maintained a relationship with lead counsel that was (and is)
17 strictly professional. Chobor Depo. Tr. at 62-63. SEIU 1199 is pursuing this action because it is in
18 the best interests of their beneficiaries. SEIU 1199 is clearly adequate and should be certified.
19 Defendants' authority is inapposite. Defs' Opp. at 21. Each case was issued before Congress passed
20 the Private Securities Litigation Reform Act ("PSLRA") and not one involved an institutional
21 investor. *Id.*

22 **B. Mr. Kuehmichel Is an Adequate Class Representative**

23 As with SEIU 1199, defendants essentially concede Mr. Kuehmichel's adequacy. Defs' Opp.
24 at 23-24. They do not challenge Mr. Kuehmichel's involvement in the case or his knowledge of the
25 allegations. *Id.* Nor could they. Mr. Kuehmichel has been intimately involved in the litigation, has
26 responded to all discovery served upon him, and has produced all of his records concerning Oracle in
27 this litigation. Kuehmichel Depo. Tr. at 15-19, 22. In fact, he demonstrated his willingness to serve
28 the class' interest by traveling from Boise, Idaho to Palo Alto, California to appear for his deposition

1 where he testified, at length, about the case, including allegations about 11i (*id.* at 34, 120-27, 136),
2 the economy (*id.* at 34, 55-56, 99), Oracle's fraudulent accounting in 2Q01 (*id.* at 116-117), and its
3 baseless forecasts for 3Q01 (*id.* at 34-35, 39-40, 42). He knew that he was participating in this case
4 because he purchased his shares at the same time that defendant Ellison sold his, and he is pursuing
5 it "for all the little guys like me who didn't have a lot of money but bought the stock anyhow." *Id.* at
6 43:6-8, 154, 159. Mr. Kuehmichel is dedicated and has gone out of his way to protect the interests
7 of the class. Mr. Kuehmichel is clearly adequate.

8 Defendants claim Mr. Kuehmichel's "individual knowledge" will become a focus at trial
9 because he knew about general economic principles facing technology companies (*i.e.*, the so-called
10 "hockey stick effect"), or that he would have issues with reliance because he would not have bought
11 his stock had he known of facts that were in the public domain. Defs' Opp. at 23-24. But
12 defendants do not cite a single case to support either argument. Disqualifying plaintiffs based on
13 what they knew and did not know would be an impermissible inquiry into the merits of the litigation.
14 *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 144 (N.D. Cal. 2004); *IPO*, 227 F.R.D. at 110 n.339
15 (a determination of "whether [publications] placed investors on inquiry notice [was] a task better left
16 to the trier of fact"). Such contentions are unsupportable. *See* discussion at §IV.A, *infra*.

17 **C. Drifton Finance Corporation Is an Adequate Class Representative**

18 Through its principal, Jacques Fuhrer ("Mr. Fuhrer"), Drifton Finance Corporation
19 ("Drifton") has been intimately involved in the case for the last four years. Fuhrer Depo. Tr. at 150-
20 51, 176-77. Like the other proposed representatives, Drifton has a thorough understanding of the
21 case and has continuously worked with counsel "to defend all the small shareholders who have
22 incurred some losses." Fuhrer Depo. Tr. at 289:21-22. Mr. Fuhrer responded completely to
23 defendants' numerous discovery demands, produced all documents in his possession concerning
24 Oracle, and he even flew from his home in Belgium to Palo Alto, California for his deposition. *Id.* at
25 5, 11, 159, 297-98. Defendants' attacks on Mr. Fuhrer's adequacy are baseless. His actions
26 demonstrate his adequacy.

27 As with Mr. Chu, defendants attack Mr. Fuhrer's English skills because they have no
28 legitimate basis for disqualification. Defs' Opp. at 24. Defendants cite only three pages of a 316-

1 page deposition (entirely in English) to support this disingenuous argument. *Id.* Mr. Fuhrer is, in
2 fact, fluent in English and has a sound understanding of the case. He demonstrated knowledge of the
3 allegations about the effect of the economy on Oracle's business and its forecasts (Fuhrer Depo. Tr.
4 at 160-62), allegations concerning Suite 11i (*id.*), and about stock sales by defendant Ellison (*id.* at
5 160-64). Mr. Fuhrer's knowledge far exceeds that of the general nature of the allegations. *In re*
6 *Terayon Communications Sys., Inc. Sec. Litig.*, No. C 00-01967 MHP, 2003 U.S. Dist. LEXIS 2852,
7 at *10 (N.D. Cal. Feb. 24, 2003).⁶

8 **D. Robert Sawyer Is an Adequate Class Representative**

9 Like the other lead plaintiffs, Robert Sawyer ("Mr. Sawyer") has been involved in this
10 litigation since day one. Sawyer Depo. Tr. at 24. He has reviewed the pleadings, spoken with his
11 lawyers about the case, responded to numerous discovery demands, and traveled from his home in
12 Cincinnati, Ohio to Chicago, Illinois for deposition where he demonstrated his knowledge of the
13 case in a seven-hour deposition. *Id.* at 1, 7, 10-16, 49-50, 52-53, 62-63, 124-26, 179, 245.
14 Mr. Sawyer testified that he filed this lawsuit because he "was damaged due to misleading comments
15 by defendant Larry Ellison specifically and Oracle" – including statements about the quality of 11i,
16 that the Company was "immune to the economic downturn," and that "sales were doing great."
17 Sawyer Depo. Tr. at 124-26; 62:2-17, 179:21-24. In fact, Mr. Sawyer testified that defendants' false
18 statements "definitely cause[d] the price to be higher and stay higher." *Id.* at 207:17-208:5.

19 Not only is Mr. Sawyer well informed, but he is also highly motivated. After defendant
20 Ellison sold his stock, Mr. Sawyer telephoned Oracle Investor Relations to find out why. *Id.* at 53.
21 As with the other proposed representatives, Mr. Sawyer's knowledge about this lawsuit more than
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23 ⁶ Defendants distort Mr. Fuhrer's deposition testimony in support of an unwarranted
24 disqualification. Defs' Opp. at 24. Their statements that Mr. Fuhrer "did not read the Complaint"
25 and does not know the composition of the proposed class are false. *Id.* Mr. Fuhrer testified that he
26 reviewed "a document which they have given to the Court *as a complaint*" (Fuhrer Depo. Tr. at
27 16:22-23) and that he is pursuing the case "to defend all the small shareholders who have incurred
28 some losses." Fuhrer Depo. Tr. at 289:21-22. Contrary to defendants' assertion, Mr. Fuhrer has not
"abdicated all responsibility in the suit to counsel" and is not pursuing "a strategy of not asking
questions of his counsel." Defs' Opp. at 22, 24 *compare* Fuhrer Depo. Tr. at 292. A nine-hour
deposition proves otherwise.

1 satisfies the requirement to be aware of the general nature of the allegations. *Terayon*, 2003 U.S.
2 Dist. Lexis 2852, at *10.

3 **E. Dzung Chu Is an Adequate Class Representative**

4 As with Mr. Fuhrer, defendants attack Dzung Chu's ("Mr. Chu") English skills because they
5 have no other legitimate objection. Defs' Opp. at 5, 22. There is nothing in Fed. R. Civ. P. 23 that
6 requires a class representative to have a threshold level of English proficiency and defendants offer
7 nothing to suggest otherwise. *Id.* Mr. Chu is a Vietnamese American who speaks English as a
8 second language. While he elected to provide sworn deposition testimony in his native Vietnamese
9 language, Mr. Chu has communicated effectively with plaintiffs' counsel and even answered some
10 of his deposition questions in English. Chu Depo. Tr. at 7, 65-66. Mr. Chu is a technical support
11 professional at a Silicon Valley technology company (Xilinx, Inc.) and his duties require English
12 proficiency. Federal Rule of Civil Procedure 23 simply does not discriminate between potential
13 class representatives based on speculative language barriers. Ironically, even though defendants
14 attack Mr. Chu's ability to understand and communicate in English, they inconsistently contend that
15 Mr. Chu may have already known about Oracle's fraud from his review of analyst reports and
16 research on the Internet, both of which are written in English. Defs' Opp. at 15.

17 Defendants' only substantive challenge to Mr. Chu's adequacy is his alleged "unfamiliarity"
18 with certain undefined "aspects" of the case. Defs' Opp. at 22. Defendants have ignored Mr. Chu's
19 deposition transcript. They do not specify the "aspects" of the case Mr. Chu is unfamiliar with
20 because his deposition testimony confirms that he understands the general nature of the allegations
21 of the Complaint, including Oracle's false financial forecasts (Chu Depo. Tr. at 63-64); Oracle's
22 false statements concerning the functionality of Suite 11i (including specific customer problems) (*id.*
23 at 64-70, 84); and false statements made by Stephanie Aas regarding the United States economy (*id.*
24 at 92-93). Chu also illustrated general awareness of the accounting allegations. *Id.* at 96. Mr. Chu's
25 deposition testimony confirms that he is "aware of the general nature of the allegations, and . . . ha[s]
26 some familiarity with the underlying legal principles." *Terayon*, 2003 U.S. Dist. LEXIS 2852, at
27 *10; *see also In re Insurance Mgmt. Solutions Group, Inc. Sec. Litig.*, 206 F.R.D. 514, 517 (M.D.
28 Fla. 2002); *In re Adobe Sys., Inc. Sec. Litig.*, 139 F.R.D. 150, 156 (N.D. Cal. 1991); *In re Bank One*

1 *Sec. Litig.*, No. 00 CV 0767, 2002 U.S. Dist. LEXIS 8709, at *19 (N.D. Ill. May 9, 2002). Mr. Chu
2 is an adequate representative.

3 **III. The Proposed Class Representatives Are Typical of the Class and Are Not**
4 **Subject to Unique Defenses**

5 As plaintiffs demonstrated in their motion, plaintiffs satisfy the typicality requirement if their
6 claims arise from the same event or course of conduct that gives rise to claims of the class and are
7 based on the same legal theory. *Schneider v. Traweek*, No. CV 88-0905 RG (Kx), 1990 U.S. Dist.
8 LEXIS 15596, at *21 (C.D. Cal. Aug. 7, 1990). Contrary to defendants' assertion, case law is clear
9 that "differences in the amount of damage, the size or manner of [stock] purchase, the nature of
10 the purchaser, and even the specific document influencing the purchase will not render a claim
11 atypical in most securities cases." *Weinberger v. Jackson*, 102 F.R.D. 839, 844 (N.D. Cal. 1984).
12 Defendants' challenges fail here because the claims of all plaintiffs arise from defendants' scheme of
13 false and misleading representations.

14 **A. Each Proposed Class Representative Lost a Substantial Amount on**
15 **Their Oracle Investments**

16 Defendants contend that several of the proposed representatives are atypical because (while
17 defendants are not sure) they "may" have individual damages issues. Defs' Opp. at 19, 23. The
18 Ninth Circuit has long held that individual damages issues, to the extent they may exist, do not
19 prevent class certification where, as here, common questions, particularly common liability issues,
20 predominate over individual questions. *See Blackie*, 524 F.2d at 905. Indeed, "[t]he amount of
21 damages is invariably an individual question and does not defeat class action treatment." *Id.*; *In re*
22 *Activision Sec. Litig.*, No. C-83-4639 AMHP, 1985 U.S. Dist. LEXIS 19901, at *36 (N.D. Cal.
23 May 10, 1985). As the Court stated in *In re MDC Holdings Sec. Litig.*, 754 F. Supp. 785 (S.D. Cal.
24 1990), "it would defy common sense to find that class certification is defeated by the possibility of
25 individual questions appertaining to one of the elements of one of the case's causes of action." *Id.*
26 at 806-07. In other words, issues regarding damages "do not have relevance in determining class
27 certification." *Yamner v. Boich*, No. C-92-20597 RPA, 1994 U.S. Dist. LEXIS 20849, at *15 (N.D.
28 Cal. Sept. 15, 1994).

1 **B. Virtually All Large Institutions Use Investment Advisors – This**
2 **Practice Does Not Subject Them to Unique Defenses**

3 Defendants contend that SEIU 1199 lacks standing to bring a claim against the defendants
4 because its Oracle shares were purchased by an outside investment manager. Defs' Opp. at 21.
5 Nothing in the securities laws, however, holds that an institutional investor which delegates
6 investment authority to professional advisors is not a purchaser or seller of securities, as defendants
7 argue. In fact, the same theory was flatly rejected in *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D.
8 267, 282 (S.D.N.Y. 2003), where the court recognized that the fact that an institutional investor
9 "relied on the advice of highly sophisticated investment managers" does not deprive it of standing or
10 otherwise make it atypical or subject it to unique defenses. *Id.* at 281. Institutional investors "are
11 likely to use advisors, to invest conservatively in securities they consider undervalued by the
12 market." *Id.* at 282. Thus, *WorldCom* recognized that a rule precluding investors from delegating
13 investment decisions to advisors would, in effect, bar large, sophisticated institutional plaintiffs from
14 serving as class representatives. *Id.* Such a rule would undermine the PSLRA's stated purpose to
15 "increase the likelihood that institutional investors will serve as lead plaintiffs." *Id.*

16 Defendants' also theorize that SEIU 1199 is atypical because its investment advisors could
17 not have been deceived by Oracle's false statements. Defs' Opp. at 21-22. This argument defies
18 common sense and has been rejected by the Ninth Circuit. *Hanon v. Dataproduct Corp.*, 976 F.2d
19 497, 506 (9th Cir. 1992) ("Sophisticated investors are as entitled to rely on the fraud-on-the-market
20 theory as anyone else."). In fact, delving into what SEIU 1199 or its investment advisors knew or
21 did not know would be an impermissible inquiry on the merits, and their depositions defeat the
22 suggestion. See discussion at §IV.A, *infra*. But even if it were permissible, both of SEIU 1199's
23 investment advisors testified that they reviewed only publicly available information when purchasing
24 Oracle's shares. Turner Depo. Tr. at 97, 100, 102, 107; O'Keefe Depo. Tr. at 63-64, 65, 69, 80, 82.
25 Gregg O'Keefe testified that the purchase of Oracle stock in December 2000 was based on a
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1 mechanical adjustment of the percentages in SEIU 1199's portfolio, and not on any non-public
2 information that the firm possessed concerning Oracle. O'Keefe Depo. Tr. at 84, 88-89.⁷

3 **C. Sophisticated Trading Strategies Do Not Defeat Typicality**

4 Defendants assert that Mr. Chu, Mr. Kuehmichel and Drifton are not typical because they
5 engaged in options and other sophisticated trading that did not rely on the integrity of the market
6 price. Defs' Opp. at 19, 23-24. Defendants are simply wrong. As the Declaration of Michael Marek
7 ("Marek Decl.") explains, options traders rely on the integrity of the market because the underlying
8 stock price sets the value of the option. See Marek Decl., ¶¶5-10. In fact, Judge Illston recently
9 rejected defendants' very contention, holding that "investors who trade options are entitled to the
10 fraud-on-the-market presumption because the value of options is directly related to the value of
11 common stock." *CV Therapeutics*, 2004 U.S. Dist. LEXIS 17419, at 6; see also *Hanon*, 976 F.2d at
12 506 (fraud-on-the-market applies where "[t]he purchase price of the stock was set by the market").
13 A plaintiff's trading history, strategies, and activities are nevertheless irrelevant to class certification
14 issues. See, e.g., *Serafimov v. Netopia, Inc.*, No. C-04-03364 RMW, 2004 U.S. Dist. LEXIS 25184,
15 at **16-19 (N.D. Cal. Dec. 3, 2004) (holding that a day trader was not rendered atypical under Fed.
16 R. Civ. P. 23 and collecting cases); *Feldman v. Motorola, Inc.*, No. 90 C 5887, 1993 U.S. Dist.
17 LEXIS 14631, at *19 (N.D. Ill. Oct. 14, 1993) ("different traders may use market information
18 differently, all the while relying on it"). Mr. Chu, Mr. Kuehmichel and Drifton all relied on the
19 integrity of the market when purchasing Oracle's securities, and their claims are typical of the claims
20 of the class. See Marek Decl., ¶¶5-10.

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24 ⁷ *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 59-60 (2d Cir. 2000), relied
25 upon by defendants for their contention that investment managers cannot be deceived, is
26 contradicted by the testimony here. Defs' Opp. at 22. *Baffa* is also distinguishable. There, the court
27 denied a sophisticated broker's motion to intervene as a class representative where the broker "had
28 access to *more* information than other investors in the putative class" in a case where the information
that rendered the statements at issue misleading "could be deduced" from the company's United
States Securities and Exchange Commission filings. *Id.* at 59. The same access is not evident here.

1 **1. Mr. Chu Relied on the Integrity of the Market When Trading**
2 **in Oracle Securities**

3 Defendants contend that Mr. Chu is atypical under Fed. R. Civ. P. 23 because his purported
4 “swing trading” patterns “expose[] [him] to a reliance defense.” Defs’ Opp. at 23; Declaration of
5 Stefan Boedeker in Support of Defendants’ Opposition to Plaintiffs’ Motion for Class Certification
6 (“Boedeker Decl.”) at 7-8. Swing trading (or even day trading) does not render a plaintiff atypical.
7 See *CV Therapeutics*, 2004 U.S. Dist. LEXIS 17419, at 8 (rejecting argument that “day trading
8 activities render [plaintiff] atypical” because defendants had not established that plaintiff “focused
9 on ‘technical price movements’ [instead of] fundamentals and on defendants’ statements in deciding
10 when to buy or sell”). Even if it did, defendants have not satisfied their burden of establishing that
11 Mr. Chu was a swing trader. Indeed, even under their expert Mr. Boedeker’s definition of the term,
12 Mr. Chu is not a swing trader. His largest purchase of 10,000 shares occurred during the heart of the
13 Class Period on January 23, 2001, and he held the stock for two months until the truth about Oracle’s
14 business began to be revealed. Boedeker Decl., Ex. 5. *Id.* Mr. Chu did not, as Mr. Boedeker claims,
15 purchase the stock “for several days, if necessary” to capture short term price movements. *Id.*
16 Defendants’ reliance defense theory is pure speculation and should be rejected.

17 Defendants also suggest that Mr. Chu’s standing is somehow in doubt because his wife was
18 involved in the execution of the trades in Oracle stock. Defs’ Opp. at 23. Defendants cite no
19 authority to support such a theory. Mr. Chu and his wife held their Oracle stock in a *joint*
20 investment account and suffered economic loss when their Oracle shares declined in value due to
21 defendants’ fraud. Mr. Chu’s wife consulted with him shortly after purchasing 10,000 Oracle shares
22 on January 23, 2001, and they jointly made the decision to hold the shares. Chu Depo. Tr. at 155,
23 171-72. Mr. Chu also testified that it was his decision to sell most of his Oracle shares in March
24 2001. Chu Depo. Tr. at 186:18. None of these facts even remotely give rise to unique standing
25 defenses. In fact, Judge Patel held that a potential class representative is not rendered atypical even
26 if he delegates absolute trading and decision making responsibility to a third-party. *Terayon*, 2003
27 U.S. Dist. LEXIS 2852, at **10-12.

1 **2. Mr. Kuemichel and Drifton Both Relied on the Integrity of the**
2 **Market When Trading in Oracle Securities**

3 Contrary to defendants' assertion, both Mr. Kuehmichel and Mr. Fuhrer relied on the
4 integrity of the market even in trading options. Defs' Opp. at 23. Both plaintiffs purchased Oracle
5 stock based on defendants' false and misleading statements. Kuemichel Depo. Tr. at 55-56, 73;
6 Fuhrer Depo. Tr. at 135. These purchases alone belie defendants' contention that they are atypical.
7 *See CV Therapeutics*, 2004 U.S. Dist. LEXIS 17419, at *7 ("While the motivations behind short-
8 selling may be inconsistent with the assumptions underlying the fraud on the market theory . . . a
9 plaintiff may still be entitled to the presumption of reliance if he makes ordinary purchases of
10 common stock and sustains losses on these holdings."). Mr. Kuehmichel purchased 2,000 shares on
11 January 23, 2001 (the same day that defendant Ellison sold his shares), 2,000 shares on February 2,
12 2001, and 1,000 shares on February 12, 2001. He testified that he did so based on defendants'
13 statements that Oracle was "doing well in an economy that was not doing so well, [and] that they had
14 a new product that was going to carry them into the 21st century that would be the gold standard for
15 all enterprise-type software." Kuemichel Depo. Tr. at 55:24-56:3, 73; Boedeker Decl., Ex. 3.
16 Likewise, Drifton, through Mr. Fuhrer, purchased 90,000 shares of Oracle stock on February 16,
17 2001 based on defendants' misrepresentations. Boedeker Decl., Ex. 7. Mr. Fuhrer testified that "I
18 entered the stock market buying this stock and I believed in him, what he was saying, and it turned
19 out to be just the opposite." Fuhrer Depo. Tr. at 135.

20 Both representatives also purchased their options based on the integrity of the market. As
21 Judge Illston recognized in the *CV Therapeutics* case, "investors who trade options are entitled to the
22 fraud-on-the-market presumption because the value of options is directly related to the value of
23 common stock." *CV Therapeutics*, 2004 U.S. Dist. LEXIS 17419, at *6; *see also* Marek Decl., ¶¶5-
24 10. Even if an options trader believes that the market will decline (which the plaintiffs here did not
25 believe), he/she is not atypical unless defendants establish plaintiffs' "core investment strategy" was
26 to "bet against" the stock. *CV Therapeutics*, 2004 U.S. Dist. LEXIS 17419, at *8. Plaintiffs in this
27 case were certainly not betting against Oracle's stock. Kuehmichel Depo. Tr. at 55-56; Fuhrer Depo.
28 Tr. at 205-06. As discussed above, they believed in Oracle because of defendants'

1 misrepresentations. Similar to the plaintiff in *CV Therapeutics*, Mr. Kuehmicel's testimony shows
2 that he sought to profit from his investment in Oracle stock and to manage the risk of investment by
3 also participating in call option transactions. Kuehmicel Depo. Tr. at 56, 78-79. Plaintiffs' options
4 trading simply does not render them atypical.

5 **IV. Defendants Bear the Burden of Rebutting the Presumption of Reliance and**
6 **Cannot Do So Here**

7 Under the well established fraud-on-the-market theory of liability, plaintiffs are entitled to a
8 presumption of reliance based upon their allegations that defendants artificially inflated the price of
9 Oracle stock by issuing false and misleading statements and by failing to disclose material facts.
10 *Basic, Inc. v. Levinson*, 485 U.S. 224, 247 (1988); *see also Blackie*, 524 F.2d at 905. Under the
11 fraud-on-the-market theory because reliance is presumed, plaintiffs need not prove that each plaintiff
12 personally relied on the misstatements or omissions. *In re Seagate Tech. II Sec. Litig.*, 843 F. Supp.
13 1341, 1354 (N.D. Cal. 1994). The "defense of non-reliance is not a basis for denial of class
14 certification." *Hanon*, 976 F.2d at 509.

15 Thus, defendants are incorrect in asserting that plaintiffs are required to show that each
16 investor traded in Oracle securities without knowledge of the "'truth' that was allegedly misstated."
17 Defs' Opp. at 12. That is defendants' burden at trial.

18 **A. Plaintiffs Are Not Required to Show Lack of Knowledge of**
19 **Fraudulent Scheme**

20 Defendants do not cite a single case since *Basic* adopted the fraud-on-the-market
21 presumption of reliance that requires plaintiffs to prove that they were "unaware of the 'truth' that
22 was allegedly misstated." Defs' Opp. at 12-13. Defendants' own authority expressly prohibits such
23 a factual inquiry at the class certification stage. *See, e.g., In re Applied Micro Circuits Corp. Sec.*
24 *Litig.*, No. 01CV0649 K (AJB), 2003 U.S. Dist. LEXIS 14492, at **11-12 (S.D. Cal. July 10, 2003)
25 (a motion for class certification is an inappropriate forum for making a factual determination
26 regarding the efficiency or inefficiency of the market during the class period); *IPO*, 227 F.R.D. at
27 110 n.339 (a determination of "whether [publications] placed investors on inquiry notice [was] a task
28 better left to the finder of fact"). Defendants also disregard this Court's recent holding that it is
impermissible to "advance a decision on the merits to the class certification stage" by asking this

1 Court to rule on what is essentially an affirmative fact-specific truth on the market defense. *Dukes*,
2 222 F.R.D. at 144.⁸

3 In *Applied Micro*, defendants argued that the market for the company's shares was not
4 efficient, and thus plaintiffs could not rely on the fraud-on-the-market theory. 2003 U.S. Dist.
5 LEXIS 14492, at *10. Defendants then argued that without the fraud-on-the-market theory,
6 plaintiffs could not rely on the presumption of reliance, and therefore "each purported class member
7 must make an individualized showing of reliance." *Id.* The court declined to make the factual
8 determination urged by defendants, noting that it was not necessary to reach the merits of the action
9 in determining that the class should be certified. *Id.* at **11-12.

10 Similarly, in *IPO*, defendants opposed class certification claiming individualized inquiry into
11 investors' knowledge of facts allegedly misstated or withheld would be necessary. *Id.* at 109-10.
12 Defendants contended that "pervasive press reports" would have put readers "on notice to inquire
13 further," and, as a result, a "subjective inquiry into each claimant's state of mind" would have to be
14 performed to determine "which purchasers knew what, and when." *Id.* In rejecting this theory, the
15 court held it was a class-wide issue for trial:

16 [T]he question of whether publicly available information "would have made any
17 reader aware of the allegations here" **presents an important class-wide common**
18 **issue.** . . . Furthermore, **differences among class members in terms of access to**
19 **publicly available information** (e.g., whether certain investors actually saw all
20 publicized materials, or whether they had access to sophisticated investment advice
21 in interpreting the releases) **are insufficient to defeat certification or rebut**
22 **plaintiffs' presumed reliance.**⁹

23 ⁸ Although defendants state in a footnote that the "'truth on the market' defense . . . is not at
24 issue at this class certification stage of the litigation," defendants' citation to and purported analysis
25 of media and analyst reports belie this representation. Defs' Opp. at 13, n.3 & 13-16. Indeed,
26 defendants argue that "the facts underlying Plaintiffs' claims of fraud were widely publicized and
27 available to investors." *Id.* at 13. Under the truth-on-the-market doctrine, "a defendant can escape
28 liability for a false statement – or one that reveals less than the full truth – by showing that the
market was not affected by the misrepresentation because the truth of the matter was known already
and had been factored into market prices." *Provenz v. Miller*, 102 F.3d 1478, 1492 n.4 (9th Cir.
1996).

⁹ In rejecting defendants' argument, the *IPO* court expressly distinguished *Zimmerman v. Bell*,
800 F.2d 386 (4th Cir. 1986), relied upon by defendants here, because it "**pre-dated the fraud on the**
market presumption of reliance created in *Basic*, and concerned a situation where the alleged fraud
was **explicitly** revealed by numerous publications." *IPO*, 227 F.R.D. at 111 n.342 (second emphasis

1 *Id.* at 110-111. For the same reasons, this Court should reject defendants' assertion that plaintiffs
2 must show that each investor lacked knowledge of the fraud prior to class certification.

3 **B. Defendants' Own Exhibits Negate a Truth-on-the-Market Defense**
4 **and Contain Their Continuing False Assurances that Served to**
5 **Drown Out Any So-Called Truth**

6 At trial, plaintiffs will prove that the analyst and news reports cited by defendants actually
7 repeated and bolstered defendants' false statements, further misleading the market rather than
8 revealing the "truth" as claimed by defendants:

- 9 • On December 15, 2000, Morgan Stanley Dean Witter reported that: "[t]he company
10 expects 100 [11i] implementations to go live by January and over 1,000
11 implementations are now underway," "Oracle . . . gave indication of a **robust
pipeline dominated by Fortune 500 clients**," and "Oracle management feels that the
demand environment for enterprise software will remain in tact." Declaration of
12 Vincent P. Schmeltz III in Support of Defendants' Opposition to Plaintiffs' Motion
13 for Class Certification ("Schmeltz Decl."), Ex. 8.
- 14 • The December 15, 2000 Banc of America Securities report stated: "**management
believes the number of [11i] live customers could be in the hundreds** by February
15 2001." Schmeltz Decl., Ex. 9.
- 16 • In its December 15, 2000 report, Goldman Sachs & Co. stated: "**Oracle management
indicated it has seen no effects of a slower economy** on its business." Schmeltz
17 Decl., Ex. 10.
- 18 • On January 11, 2001, Bloomberg News reported that: "[c]ompany spokeswoman
Stephanie Aas today said **Oracle has yet to see any signs that its business is being
hurt by the economic slowdown** or reported cuts to information-technology
19 budgets." Schmeltz Decl., Ex. 13.
- 20 • The February 8, 2001 Deutsche Bank Alex. Brown, Inc. report stated: "**[a]ccording
to management, it has yet to see macro-related weakness in its business**," and
21 "Mr. Henley reiterated that the company's outlook and guidance were unchanged for
F3Q'01 (Feb)." Schmeltz Decl., Ex. 17.

22 only in original). The *IPO* court also found *Frigitemp Corp. v. Fin. Dynamics Fund, Inc.*, 524 F.2d
23 275 (2d Cir. 1975) to be inapposite because the defendants in *Frigitemp* did nothing to induce the
24 plaintiffs' belief that caused plaintiffs to give up their shares, and the truth was peculiarly within the
25 knowledge of the plaintiffs. *IPO*, 227 F.R.D. at 111 n.343. Defendants' reliance on 5 J. Moore,
Federal Practice §23.45[5][a] (2005), is likewise misplaced because the cited section relies on
26 *Zimmerman*. Similarly inapposite are the remaining cases cited by defendants. *Gurary v.*
Winehouse, 190 F.3d 37 (2d Cir. 1999), addressed the securities fraud claims of a single plaintiff, not
27 a class, on summary judgment. Neither of the Ninth Circuit cases cited by defendants, *Soliman v.*
Philip Morris, Inc., 311 F.3d 966 (9th Cir. 2002), and *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192
28 (9th Cir. 2001), was a class action or even involved claims of securities fraud. The latter discussed
the elements of a negligent misrepresentation claim, not fraud. 273 F.3d at 1201 n.2.

1 Moreover, the reports relied upon by the defendants also included the *analysts' own positive*
2 *opinions and projections*. Like the statements in the preceding paragraph, these statements confirm
3 that the misleading effect was not nullified. *Provenz*, 102 F.3d at 1376. For example, the December
4 15, 2001 Morgan Stanley Dean Witter report included the statements: “[t]he PC downturn . . . should
5 not impact business at Oracle,” “[s]uccess in the apps business is leading to more large deals,”
6 “[d]eal sizes in the applications business have been increasing,” and “11.03 was released in
7 November to resolve [issues with 11i].” Schmelzt Decl., Ex. 8. The December 15, 2001 Banc of
8 America Securities report glowingly stated: “[w]e continue to be quite optimistic about Oracle’s
9 B2B infrastructure sector,” and “Oracle’s market opportunity and suite-based approach remain
10 robust.” Schmelzt Decl., Ex. 9. In its February 8, 2001 report, Goldman Sachs and Co. stated: “[w]e
11 think applications is doing fine,” and “[o]verall we think estimates are OK for the quarter.”
12 Schmelzt Decl., Ex. 16. The February 8, 2001 Deutsche Bank Alex. Brown, Inc. report stated: “E-
13 business software remains a top corporate IT priority, and we believe Oracle is in the midst of a
14 strong product cycle with its 11i applications suite.” Schmelzt Decl., Ex. 17. An investor reading
15 these positive reports would certainly not walk away with knowledge that Oracle was having major
16 problems with its business and would miss its 3Q01 financial projections.

17 Further, the so-called statements of “truth” relied upon by defendants here were far too
18 limited in circulation to counteract defendants’ widely disseminated falsehoods and positive
19 reassurances.¹⁰ *Provenz*, 102 F.3d at 1492-93; *Kaplan v. Rose*, 49 F.3d 1363, 1376 (9th Cir. 1994).
20 For example, defendants rely on trade publications (Exs. Schmelzt Decl., Exs. 18 and 22), a
21 transcript of a Q&A session that took place at an Oracle Applications User Group Conference
22 (Schmelzt Decl., Ex. 2), regional newspapers (Schmelzt Decl., Exs. 12 and 23), and an online news
23 service (Schmelzt Decl., Ex. 19), all of which likely have small audiences. Indeed, defendants have
24 made no showing regarding the distribution of *any of the material* upon which they rely. *Provenz*,

26 ¹⁰ Several of the so-called “truthful” statements cited by defendants, including those found in
27 Schmelzt Decl., Exs. 2, 5-7, *precede* the Class Period and therefore cannot serve to counterbalance
28 defendants’ false statements made months later. *Kaplan*, 49 F.3d at 1378.

1 102 F.3d at 1492-93 (defendants must prove the “truth” entered the market with a degree of
2 credibility and *intensity* sufficient to completely nullify the misleading effect of their statements).
3 Moreover, the news reports relied upon by Oracle (Schmeltz Decl., Exs. 5, 11-12, 19 and 25) amount
4 to no more than speculative scrutiny by the press – insufficient to prove defendants’ “truth on the
5 market” theory. *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989).

6 In sum, defendants’ purported “truthful” information did not enter the market with a degree
7 of credibility and intensity sufficient to nullify the misleading effect of defendants’ false statements.
8 To the contrary, the false assurances drowned out any so-called truth.

9 DATED: August 12, 2005

Respectfully submitted,

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1 DECLARATION OF SERVICE BY U.S. MAIL & FACSIMILE
2 PURSUANT TO NORTHERN DISTRICT LOCAL RULE 23-2(c)(2)

3 I, the undersigned, declare:

4 1. That declarant is and was, at all times herein mentioned, a citizen of the United States
5 and employed in the City and County of San Francisco, over the age of 18 years, and not a party to
6 or interested party in the within action; that declarant's business address is 100 Pine Street,
7 Suite 2600, San Francisco, California 94111.

8 2. That on August 12, 2005, declarant served by facsimile and U.S. Mail the
9 PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR CLASS
10 CERTIFICATION to the parties listed on the attached Service List and this document was forwarded
11 to the following designated Internet site at:

12 <http://securities.lerachlaw.com/>

13 3. That there is a regular communication by facsimile between the place of origin and
14 the places so addressed.

15 I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th
16 day of August, 2005, at San Francisco, California.

17 /s/ Ruth A. Cameron
18 RUTH A. CAMERON
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ORACLE III (LEAD)

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